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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 28

THE STATE OF TEXAS, AND J. C. CLOPTON AND BULLOCK HYDER, RECEIVERS,
Petitioners,

vs.

DAVID DONOGHUE, TRUSTEE OF TRINITY REFINING COMPANY, DEBTOR,
Respondent.

SUPPLEMENTAL AND REPLY BRIEF FOR THE STATE OF TEXAS.

WILLIAM MCCRAW,
Attorney General of Texas;
W. J. HOLT,
Assistant Attorney General;
WILLIAM C. DAVIS,
Assistant Attorney General;
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Assistant Attorney General;
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SUPPLEMENTAL AND REPLY BRIEF FOR THE STATE OF TEXAS.

STATEMENT

Proposition No. 1 upon which the respondent relies is to the effect that the Circuit Court of Appeals did not err in holding that the oil which the State seeks to confiscate is not a nuisance *per se*, that the title to it was in the debtor at the time the Petition for Reorganization was filed, and that it passed to

and is held by the Trustee as a part of the debtor's estate. This holding by the Circuit Court of Appeals (R. 118-119), which respondent claims supports his Proposition No. 1, is based upon neither reason nor authority. Moreover, as has been demonstrated by the various authorities cited and discussed in the argument supporting the validity of the State's confiscation act (Sec. 10, Article 6066a), (State's Brief, pp. 14 to 18), that the contention is without merit.

We assert that the proper answer to this contention is that, regardless of the fact that the Circuit Court held that the oil was not a nuisance *per se*, (R. 158), or that the same passed to the Trustee as part of the debtor's estate, (and to this the State does not agree), the basic issue and the State's principal grievance is that the Bankruptcy Court should have recognized the official representation made to it by the Attorney General of Texas that the oil was and is illegal, and that since the Bankruptcy Court has no jurisdiction to condemn the oil and adjudge a forfeiture of the same to the State, the State of Texas should have been granted leave to test that question in a state court as provided by statute. That this is the primary issue is demonstrated by the language of the dissenting Judge (R. 124):

> "The bankruptcy court sitting in reorganization is not competent to inquire into or adjudge the condemnation. The result of the court's order in refusing permission to proceed, if effective to prevent the State's first proceeding, would be that the reorganization would proceed on the as-

sumption that the oil was the debtor's property only to have that assumption disappear if in a condemnation suit filed after reorganization judgment went for the state. For it is perfectly plain that a proceeding in which the question of whether the property is to be forfeited may not be tried and decided, cannot effect that question. * * * I think the State did the seemly thing in applying for permission, and that permission should have been granted as matter of course. If the oil is condemned while the property is still in the custody of the reorganization court, certainly that court can be depended upon in the exercise of the comity due between courts to surrender it on the State's writ for sale as the statute requires." (See also Authorities cited on pp. 19 to 25 of State's Brief.)

On page 5 of respondent's brief it is agreed that the State's confiscation act is penal in the international sense, and that the Bankruptcy Court is without jurisdiction to enforce it or to move in aid of it. This being true, it is argued that, it is the duty of the Bankruptcy Court to retain possession of the oil; and for the Bankruptcy Court to deliver possession of the oil to the State would be a plain violation of the rule "the courts of no country execute the penal laws of another," and for the Bankruptcy Court to grant the State's request to take proceedings for the confiscation of the oil would be to recognize and assist in the enforcement of the State's penal statute. To follow the reasoning submitted by the respondent would amount to a total disregard of the declared policy of the Congress of the United States exemplified in the so-called Connally Hot Oil Act,

effective February 22, 1935 (15 U. S. C. A., Sec. 715 et seq.), and the judicial interpretations placed thereon by the courts of the United States (See footnote 6, page 23 of State's brief).

In *Ryan v. Amazon Petroleum Company, a corporation, et al.*, 71 Fed. (2d) 1, after discussing certain phases of Section 9c, (15 U. S. C. A., Section 709c), later stricken down by this court, (Panama Refining Company v. Ryan, 293 U. S. 388) the Circuit Court of Appeals, after referring to the oil proration laws of the State, says:

> "The regulation of production is assumed to have been validly made by the state, and the federal regulation is actually only of interstate and foreign commerce adjusted to aid and not to thwart the state action. Such cooperation between state and central government is not constitutionally wrong, but right and desirable. The central government was not created to be an opponent and a rival of the state governments, but to be a supplement and a protection to them. Its enumerated powers, although supreme and sometimes exercised to the dissatisfaction of some states, *are not misused when by a happy concord of duty these governments can cooperate.*" (Italics added.)

Regarding this principle of law, the same Circuit Court of Appeals in *Griswold* v. *The President of the United States*, 82 Fed. (2d) 922, on the assumption that there were no infirmities in the particular act under examination, declared:

"We, on full consideration, held that Congress could validly prohibit transportation in interstate commerce of oil which state laws have made contraband. *We approve and reaffirm that holding.* We think appellant's arguments disregard the verities, the realities of the situation as it exists in law and in fact." (Italics added.)

The same Court in the case of *Thompson et al.* v. *Spear et al.*, 91 Fed. (2d) 430, after discussing the provisions of the State's confiscation act (Sec. 10, Article 6066a), and the so-called Connally Hot Oil Act (15 U. S. C. A., Sec. 715 *et seq.*), points out:

"The two agencies (State and Federal) began to function and as a result of the more stringent provisions of the two acts, as well as the *cooperative efforts of the two agencies* many cases were made for injunctions, forfeitures and criminal prosecutions, so that in a comparatively short time *orderly government* replaced chaotic disorder" (Italics added).

Subsection (b) of Section 10 of the so-called confiscation law of the State of Texas provides that, when the Attorney General is advised from any source of the presence and existence of unlawful oil and/or unlawful products, it shall be his duty to institute a suit *in rem* against such unlawful oil and/or unlawful products and against all persons owning, claiming or in possession thereof; such suit to be brought in the name of the State of Texas in any

court of competent jurisdiction in Travis County or in the county in which the oil or products is located.

The Bankruptcy Court was officially advised that the Attorney General of Texas was possessed of knowledge of the presence and existence of unlawful oil and unlawful products of oil, and but for the injunctions issued by the Bankruptcy Court directed against all persons, restraining interference with its Trustee (R. 52-53), the Attorney General would have undertaken to carry out the mandatory duty imposed upon him by statute to proceed against the alleged illegal oil question. The first step in the proceeding in the attempted abatement of the alleged nuisance was begun when the Attorney General became advised of the existence of such oil claimed to be illegal. The second step to accomplish that result was interrupted by the several injunctions issue by the Bankruptcy Court. It was then that the Attorney General officially advised the Bankruptcy Court of the illegal character of the oil and also sought permission to take proceedings for its abatement. The law of the State of Texas thus started to function. The oil had already become stigmatized as a nuisance and it was subject to abatement by the procedure provided in Section 10, Article 6066a, whereby judgment of condemnation could be secured evidencing its forfeiture to the State. The oil in question came into the hands of the Bankruptcy Trustee burdened with whatever infirmities it may have had in the hands of the debtor before it sought reorganization in the Bankruptcy Court.

To illustrate the point, we say that many states of the Union during the Prohibition Era had laws providing for the forfeiture of automobiles and other instruments used in the unlawful possession, transportation and handling of intoxicating liquors. As we recall, it was never contended that an automobile or any other vehicle in those days was considered as a nuisance per se, but by the misuse of such instruments they became forfeited to the sovereign. Many of the laws provided that, when persons were apprehended while transporting or secreting illegal liquors, the vehicles used were subject to seizure by the law enforcement officers; the laws provided that the same should be proceeded against with a view to having such instruments forfeited by reason of the unlawful acts connected with their use. Could it be said that an owner of a vehicle used in violating such laws could go into bankruptcy and frustrate valid state action looking to the suppression of such nuisances created by the handling of illegal liquors? Such is substantially the situation confronting the Attorney General of Texas in the instant cause. We believe that the mere filing of the petition for reorganization by the debtor and the drawing of the oil in question into the custody of the Bankruptcy Court could in no manner remove the asserted taint of illegality from the oil any more than a corporation dealing in intoxicating liquors could remove same from the lawful operation and consequences of valid state laws regulating same by going into a bankruptcy court.

Radford v. *Thornell*, (Sup. Ct., Iowa) 81 Iowa 709, 45 N. W. 890, is illustrative of the point attempted to be made. We quote:

> "There is nothing in the spirit or policy of the bankrupt law evidencing a purpose to exempt the property of a bankrupt estate from the operation of the state laws for governmental purposes in common with other property of the state, either by the imposition of burdens or the restraints of use; nor does the law evince a purpose to divest the state courts of authority to give force and effect to the law for such purposes.
>
> * * *
>
> "It cannot be that it is the policy of the bankrupt law to interfere with the laws of a state for the regulation or control of property, as against unlawful use, nor with the courts of the state, in the application of such laws. If, in the application of the law, the property of a bankrupt estate becomes burdened with assessments because of its misuse, they should be treated by the federal courts as other legal assessments are."

Carrying our illustration further, let it be supposed that the debtor corporation was the owner of several oil wells in the East Texas oil field. Could it be said that by the mere filing of a petition for corporate reorganization under Section 77B of the Bankruptcy Act that the bankruptcy court could direct the trustee to produce the oil wells in such manner as to violate the valid proration laws of the State of Texas? If this be the law, many of the

corporations in the East Texas oil field could by availing themselves of the provisions of Section 77B produce their wells to capacity and thereby frustrate the State's conservation laws and completely disrupt the oil industry in Texas. These illustrations could be multiplied without end.

Accordingly, it is respectfully submitted that the Bankruptcy Court erred in refusing to grant the State's motion.

On page eight of respondent's brief, Section 57j (Title 11, U. S. C. A., Sec. 93j) is quoted, and it is urged that for the Bankruptcy Court to permit the State to proceed in confiscation in one of its own courts would amount to a violation of the provisions of such Section. This contention, we submit, is untenable. A mere reading of it demonstrates the unsoundness of the contention. Section 57j has to do with "*debts owing* to the United States, a state, a county, district or a municipality *as a penalty or forfeiture shall not be allowed.*"

The State of Texas in its attempt to enforce the provisions of Article 6066a, Section 10, Revised Statutes, of Texas, is not attempting to collect a debt, but is attempting to have offending property forfeited to it.

On pages ten to twenty-one of respondent's brief, argument is submitted in support of respondent's proposition number two, to the effect that the State's

confiscation act (Sec. 10, Article 6066a, Revised Statutes of Texas), is void and unconstitutional in that it contravenes the due process clause of the Fourteenth Amendment to the Federal Constitution. This same discussion may be found in the Trustee's brief in opposition to the State's Petition for Writ of Certiorari. We believe that the contentions made by the respondent have been sufficiently answered in the authorities cited in footnote two on page six of the State's brief. Moreover, the State of Texas does not contend that the confiscation act authorizes the condemnation of any oil except that which has been *produced in violation of law and that oil which has been transported in violation of law.* The numerous rules and regulations that have been set out and discussed in respondent's brief (pp. 23 to 29), are those for the violation of which the State may institute penalty suits as authorized by Article 6036, Revised Statutes of Texas, and that infractions of such rules might be held not to result in the forfeiture of oil. It will be time enough to decide these questions when they arise.

Under respondent's Proposition No. 3 (Respondent's Brief p. 2), and argument in support thereof (Pp. 22-31, Id.), it is contended that Article 6066a, Section 10, offends against Article 1, Section 8, Clause 3 of the Federal Constitution. The Trustee did not raise this point in the Court Below, but raises the same for the first time here; however, if it be determined that the validity of the act has been properly drawn in question, as to this provision

of the Federal Constitution we desire to point out that this question has already been foreclosed against the Trustee by a specially constituted three-judge court organized under Section 266, Judicial Code (28 U. S. C. A., 380), in *Atlas Pipe Line Co.* v. *Sterling et al.*, 4 Fed supp. 441, 443, wherein the court said:

> "We think it perfectly clear that, as applied to plaintiff, the complained of statutes are valid; that the requirements they make in no manner infringe upon any of its constitutional rights. They merely provide for such regulatory steps and measures as are reasonable, necessary, and proper to prevent the handling of oil made by the statute contraband for handling, and their terms in no sense impose any burdensome restrictions upon interstate commerce, or take plaintiff's property without due process, or deny it the equal protection of the laws. *Plaintiff's broad position comes in the end to no more than an insistence upon its right to transport, in violation of the express prohibitions of the statute, oil which has been illegally produced.* No reason presents itself to our minds for believing that the Legislature, having the authority to conserve the natural resources of the state, is without power to impose upon common carriers by pipe line, inter and intra state, police regulations to make its prohibition against wasteful production effective. The complaint against the penalties as excessive may be disposed of by the observation that there is no proof that in the absence of an opportunity for hearing on the validity of the statute, these penalties are sought to be applied.
>
> "We therefore reject, as without merit, plaintiff's attacks upon the statutes.

"Nor do we think any stronger the position taken against the rules and regulations, the orders and requirements of the Commission. Certainly it goes without saying that the terms of a statute or the orders and actions of the Commission under it might be so burdensome and exacting as in effect to prevent or prohibit, contrary to the Fourteenth Amendment and the commerce clause, the conduct of the legitimate business of interstate transportation by pipe line. No such burdensome exactions are, however, shown to have been imposed here. It is hardly claimed, it is certainly not proven, that the requirements of the commission cannot be complied with without visiting irreparable injury on plaintiff. What is in effect asserted is that, since plaintiff is engaged in the business of transporting oil, an article of interstate commerce, the commission may not, in regard to reports and disclosures, impose duties upon it which require an expenditure of time, money or effort by it. We think the decisions cited do not support this view. The state may subject interstate, as well as intrastate, carriers to reasonable police regulations for the purpose of enforcing the public policy of the state in regard to shipments into or out of it. Sligh v. Kirkwood, 273 U. S. 52, 35 S. Ct. 501, 59 L. Ed. 835; Greer v. Connecticut, 161 U. S. 519, 16 S. Ct. 600, 40 L. Ed. 793; N. Y. ex rel. Silz v. Hesterberg, 211 U. S. 31, 29 S. Ct. 10, 53 L. Ed. 75; Hudson County Water Co. v. McCarter, 209 U. S. 349, 28 S. Ct. 529, 52 L. Ed. 828, 14 Ann. Cas. 560. Or the handling of business within its borders, Field v. Barber, Asphalt Paving Co., 194 U. S. 618, 24 S. Ct. 784, 48 L. Ed. 1142; M. K. & T. R. R. v. Haber, 169 U. S. 613, 18 S. Ct. 488, 42 L. Ed. 878; Asbell v. Kansas, 209 U. S. 251, 28 S. Ct. 485, 52 L. Ed. 778, 14 Ann. Cas. 1101;

Texas Co. v. Brown, 258 U. S. 465, 42 S. Ct. 375, 66 L. Ed. 721.

"We see no reason to doubt that oil illegally produced may not be, against statutory mandate, lawfully transported, Julian Oil & Royalties Co. v. *Capshaw*, 145 Okla. 237, 292, p. 841. All that it is claimed the commission has done, or is doing here, is that it will put plaintiff to some expense, cause it some trouble, and to some extent hamper the conduct of its business, in its efforts to prevent oil being produced, stored, and transported in violation of law." (Italics added).

WHEREFORE, the State of Texas prays as it did in its Original Brief.

RESPECTFULLY SUBMITTED,

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DAVID DONOGHUE, Trustee of Trinity Refining Company, Debtor, *Respondent*.

BRIEF OF THE STATE OF TEXAS IN REPLY TO SUPPLEMENTAL BRIEF FILED BY DAVID DONOGHUE, TRUSTEE.

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STATEMENT.

Since the granting of the writ of certiorari by this Court (R. 130) the Bankruptcy Court, upon a motion of a secured Creditors' Committee, entered a different order directing that the estate of the debtor Corporation be liquidated, and the Trustee has been directed to liquidate the estate in pursuance of Section 77B (C) (8) and Section 77B (K) of the Bankruptcy Act of the United States, as amended. The estate of the debtor, as will be disclosed by the Motion and